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No. _____

In The
Supreme Court of the United States

Catherine Clinger,

Petitioner,

v.

New Mexico Highlands University Board of Regents; Selimo Rael; Thomas Keesing; David Archuleta, and Leroy Sanchez, in their official and individual capacities,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the denial of tenure to a professor at a public university in retaliation for her public criticism of the Board of Regents and the process by which it selected a new university president violated the First Amendment to the United States Constitution.

Parties To The Proceeding

Petitioner

The Petitioner is Catherine Clinger. She is an individual and has no corporate affiliations.

Respondents

The Respondents are the Board of Regents of New Mexico Highlands University, Selimo Rael, Thomas Keesing, David Archuleta, and Leroy Sanchez, in their official and individual capacities.

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Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this Petition is reported at 215 F.3d 1162 (10th Cir. 2000). A copy of the opinion is included in the Appendix as App. A at 1a.

Jurisdiction

The United States Court of Appeals for the Tenth Circuit issued its original opinion on June 22, 2000. On July 5, 2000, the Petitioner filed a Petition for Rehearing *En Banc*, which was denied on August 28, 2000. App. C at 13a. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing *En Banc*. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

Constitutional And Statutory Provisions Involved

First Amendment to the Constitution

Congress shall make no law . . . abridging the freedom of speech . . . .

Fourteenth Amendment to the Constitution

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . .

42 U.S.C. § 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

Statement Of The Case

The Petitioner in this case was a tenure track professor at New Mexico Highlands University. She was also an active and outspoken member of the Faculty Senate. When a vacancy arose in the presidency of the university, the Board of Regents publicly committed to the appointment of a search committee and the conducting of a national search for a replacement. The Regents failed to keep that commitment, however, and ultimately appointed the vice president of finance, Respondent Rael, as president.

The Petitioner repeatedly and publicly criticized the Regents, which included each of the Respondents except President Rael, for their failure to honor the commitment to a national search process. According to Respondent Keesing, the Petitioner was a prominent figure in the "war" between the Regents and the faculty over the selection of a new president. In 1994, the Petitioner proposed and authored a resolution calling for a referendum of the faculty and advocating a vote of "no confidence" with respect to four of the Regents, including Respondents Keesing and Sanchez.

The basis for the "no confidence" resolution was the Regents' failure to follow the process they had publicly committed to for selecting a new university president. In addition, at a public meeting of the Faculty Senate, the Petitioner also stated her opinion that Respondent Keesing "could not be trusted." Again, the basis for the statement was the Regents' failure to follow the process to which they had committed. Respondent Keesing "took offense to that" and took the statement "personally." He subsequently told another faculty member that the Petitioner "should be more careful about what she says in Faculty Senate meetings." Finally, when the Regents ultimately appointed Respondent Rael as permanent president of the university in 1995, in violation of the process to which they had committed, the Petitioner publicly criticized that appointment.

In 1996, the Petitioner applied for tenure. She was recommended for tenure by every group included in the process, including students, faculty, the department chair, the dean, the vice-president for academic affairs, and the president. Despite these recommendations, the Regents denied tenure to the Petitioner, allegedly on the grounds that she did not possess a "terminal degree" in her field. However, numerous other faculty members had been granted tenure by the Regents in the past, despite lacking terminal degrees. Furthermore, the Petitioner was the first faculty member at Highlands to ever be denied tenure by the Regents, despite having received recommendations for tenure from all participants in the tenure approval process.

The Petitioner filed suit, alleging that her tenure denial was in violation of the First Amendment, Title VII, and Title IX. The trial court granted summary judgment in favor of the Respondents. The Court of Appeals affirmed. It found that, as a matter of law, the Petitioner's criticism of the Regents

and the president regarding the selection process used to appoint Respondent Rael "did not touch on matters of sufficient public concern to merit constitutional protection." App. A at 6a. Instead, according to the Court of Appeals, the Petitioner "simply differed with the board of trustees on the internal process they followed in selecting the president and reorganizing the University. . . . In essence, plaintiff has challenged the 'internal structure and governance' of the University. . . ." App. A at 7a. Thus, the Court of Appeals necessarily concluded that the "process" for selecting the president of a public university is not a "matter of political, social, or other concern to the community." App. A at 6a.

Reasons For Granting The Writ

This case involves an issue of great and recurring importance, the scope of protection provided to public employees by the First Amendment to the United States Constitution. The Court should hear this case for the same reasons it has heard previous First Amendment cases involving public employees. The Court of Appeals' decision in this case is based on an "erroneous view of the First Amendment" (*see Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 413 (1979)); and the Court of Appeals "misapplied [this Court's] decision in *Pickering*" and other cases (*see Connick v. Myers*, 461 U.S. 138, 142 (1983)).

I. The Process For Selecting The President Of A Public University Is A Matter Of Public Concern On Which The Speech Of Public Employees Is Protected By The First Amendment.

This Court has long recognized the broad scope of the First Amendment protection afforded to teachers in public

schools. In *Pickering v. Board of Educ. of Township High Sch.*, 391 U.S. 563, 571 (1968), the Court stated clearly that:

> a difference of opinion between Pickering [a teacher] and the board as to the preferable manner of operating the school system [is] a difference of opinion that clearly concerns an issue of general public interest.

The Court squarely rejected the premise that teachers relinquish the First Amendment right "to comment on matters of public interest in connection with the operation of the public schools in which they work . . . ." *Id.* at 568.

Next, in *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court addressed the situation where a teacher at a public junior college made statements critical of the regents' policies. According to the Court, "plainly, these allegations present a bona fide constitutional claim." *Id.* at 598.

Then, in *Mount Healthy City Sch. Dist. Board of Educ. v. Dole*, 429 U.S. 274, 282 (1977), the Court accepted the lower court's conclusion that a teacher's expression of disagreement with a school principal's proposed dress code for faculty involved a matter of public concern subject to constitutional protection.

Finally, in *Givhan*, a unanimous Court found that a First Amendment violation could occur when "the primary reason for the school district's failure to renew petitioner's contract was her criticism of the policies and practices of the school district . . . ." 439 U.S. at 411.

In concluding that the process for selecting the president of a public university is <u>not</u> a matter of public

concern subject to constitutional protection, the Court of Appeals purported to rely on the principles set forth in *Connick* and in the Tenth Circuit cases interpreting it. *Connick*, however, is easily distinguished from this case. Not only did it not involve a teacher's criticism of the operation of a school, but more importantly, *Connick* involved nothing more than an "extension of" an employee's "dispute over her transfer." 461 U.S. at 148. Indeed, the employee's speech reflected nothing more than the employee's "dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.*

The Court of Appeals attempted to bring this case within the principles of *Connick* by characterizing the selection of a new president of the university as involving an "internal process" relating only to the "internal structure and governance" of the university. App. A at 7a. According to the Court of Appeals, "the First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate." App. A at 7a. The Court of Appeals apparently believed that *Connick* supported this conclusion, because, there, the Court found no First Amendment protection for a "grievance concerning internal office policy." 461 U.S. at 154 (emphasis added). The Court of Appeals ignored the fact that the Regents in this case made a public commitment to appoint a search committee and conduct a national search for a new president. The Court of Appeals also ignored this Court's emphasis in *Connick* on the fact that the employee's speech involved matters "only of personal interest," rather than matters of "political, social, or other concern to the community." *Id.* at 146-47.

Furthermore, the notion that the selection of a university president is an "internal process" of no "concern

to the community" is at odds with the principles consistently announced by this Court, with the application of those principles by other courts of appeals, and with logic and common sense. At least two of this Court's prior decisions in the context of public schools very clearly involved policies and issues that were to some extent "internal," but were nevertheless deemed to be of concern to the community. For example, the plaintiff in *Pickering* criticized, among other things, the school board's allocation of financial resources between educational and athletic programs. 391 U.S. at 569. The issue could easily have been characterized as relating to an "internal process" for determining the "internal structure and governance" of the school district. An even more extreme example is *Mount Healthy*. There, the First Amendment protected the plaintiff's disagreement with the principal over a dress code for faculty, despite the obvious "internal" aspect of that dispute.

Numerous courts of appeals have recognized the application of the First Amendment to faculty speech that relates in some way or another to "internal" issues. For example, in *Trotman v. Board of Trustees of Lincoln Univ.*, 635 F.2d 218 (3d Cir. 1980), the plaintiff was fired after criticizing the president of the university for his proposal to increase the student-faculty ratio. *Id.* at 220.

> That much of the activity engaged in by plaintiffs falls within the protection of the First Amendment seems too evident to require any discussion. . . . The activity involved was essentially criticism of Branson [the president] and his policies and methods, which is "core" speech squarely encompassed within the First Amendment.

Id. at 225.[1]

In *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987), the plaintiff criticized the dean of the law school regarding admissions policy, the size of the student population, the school budget, and the untimely certification of graduates. The Court of Appeals there agreed with the district court that these were matters of public concern. *Id.* at 569.[2]

In *Southside Public Schools v. Hill*, 827 F.2d 270 (8th Cir. 1987), the plaintiff complained about deficiencies in implementing programs for handicapped students. Despite the arguably "internal" nature of that issue, the court found "dramatic confirmation" of its conclusion that such a complaint involved a matter of public concern in the Court's then-most recent decision on the subject, *Rankin v. McPherson*, 483 U.S. 378 (1987). In *Rankin,* the Court held that a public employee could not be fired for commenting, "if they go for him again, I hope they get him," in reference to the assassination attempt on President Reagan. The Eighth Circuit Court stated:

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[1] Ironically, Lincoln University asserted, just as the Respondents did in this case, that the "real" reason for the plaintiff's termination was the lack of a terminal degree. The plaintiff contended, as does the Petitioner in this case, that he had the equivalent of the required degree and that the degree issue was a "sham." *Id.* at 220.

[2] The court, however, erroneously referred to the public concern issue as an issue of fact instead of law.

> That the case at bar is a much clearer case of public concern than *McPherson* is shown by the fact that, as pointed out by Justice Scalia's dissent, *McPherson's* statement was only "one step removed from statements that we have previously held entitled to no First Amendment protection": assassination threats against the president and "fighting words." . . . Nevertheless, the majority of the Court applied the *Pickering-Connick-Mount Healthy* criteria in favor of protecting the employee's speech. Surely, *a fortiori*, the same result must be reached by us in the case at bar.

827 F.2d at 275-76.

Finally, in *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988), the plaintiffs prepared and circulated a report critical of the university's president and its mechanical engineering department. The report, among other things, emphasized concern that the department's "accreditation is in jeopardy because of these problems." *Id.* at 1553. The Court held that the plaintiffs' speech involved a matter of public concern, noting that "the status of a department's accreditation is the type of subject usually held to be of interest to the general public." *Id.* In the case at bar, the record is clear that part of the Petitioner's concern about the defective process for selecting the new president of the university was the possible "adverse effect on accreditation proceedings, that it would have a negative effect on grants received by the university, [and] that it would have [a] negative impact on the confidence of the community in the university. . . ." App. D at 22a.

Contrary to the view of the Court of Appeals in this case, the question is not simply whether there is some "internal" component to the issue about which a public employee speaks, but, instead, whether the issue is one of essentially "private" versus "public" concern. In *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076 (4th Cir. 1987), the Fourth Circuit Court stated:

> *Pickering*, its antecedents, and its progeny - particularly *Connick* - make it plain that the "public concern" or "community interest" inquiry is better designed - and more concerned - to identify a narrow spectrum of employee speech that is not entitled to even qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the First Amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee - most typically, a private personnel grievance. . . . The focus is therefore upon whether the "public" or "community" is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

Id. at 1079-80 (emphasis in original).

That the process for selecting the president of a public university, and the petitioner's speech in this particular case, involved a matter of "public concern" and "community

interest," as opposed to a "private matter between employer and employee," should be obvious. In any event, while perhaps not conclusive, media coverage of an issue is corroborating evidence that it is an issue of public concern. *See Pickering*, 391 U.S. at 572 (Pickering made statements "upon issues currently the subject of public attention" in the news media); and *Connick*, 461 U.S. at 160, n. 2 ("extensive local press coverage shows that the issues involved are of interest to the people of Orleans Parish") (Justice Brennan, writing for a four-member minority). Certainly the media coverage of both the selection of President Rael in this case, and of the selection of other university presidents, is ample evidence of public concern about that process. An article in the Albuquerque Journal regarding Rael's appointment read:

> Conflict continued to brew this week in Las Vegas, New Mexico, over the New Mexico Highlands University board of regents' decision to extend the university president's contract. Several students and faculty members drew up a "position paper" outlining their protest of the regents' decision in November to extend the contract of President Selimo C. Rael until mid-1998. Rael, who was the university's vice president of finance, was tapped as interim president in March. Some NMHU students and faculty wanted a national search to generate a pool of applicants before a permanent replacement was found for Gilbert Sanchez, who was ousted by the majority of the regents earlier this year. . . . The position paper calls for the regents to rescind Rael's contract and begin a national presidential search. It also asked that the

> regents appoint an interim president from outside the administration.

Albuquerque Journal, Dec. 2, 1995.[3]

A small sampling of the media coverage from other university president searches emphasizes that it was not only the presidential search in this case that was a matter of public concern. For example, the Albuquerque Journal wrote the following about the University of New Mexico Board of Regents' selection of a new president:

> The University of New Mexico Board of Regents is tooling up to select a new president for the institution, the second such search in this decade. It will hear from its local constituencies again - and, if it is prudent, it will pull them into the process. It's characteristic of tasks with as many constituencies as the naming of a university president that the manner in which they are done becomes as important as the quality of the result. A flawed process can never produce a consensus selection. In late 1989 and early 1990, the search and selection procedure that resulted in the naming of President Richard Peck ended in an eruption of

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[3] This article is one of a number that were located by reviewing the "archives" at www.abqjournal.com and utilizing the terms "presidential search" and "Clinger." Other articles on the same subject matter are included in the Petitioner's Petition for Rehearing *En Banc*. App. D at 23a-26a.

> bad feeling and litigation. . . . The Hispanic Coalition in 1990 expressed its opposition to: "any process that selects candidates in a secret cabal; any process that does not surface any New Mexican candidate; any process that does not include community and taxpayer input; any process that after months of secrecy now is determined to reach a rapid decision and force a candidate on New Mexico; any process that in secrecy can discriminate against Hispanics and minorities in impunity." Clearly, tempers were high as the UNM Regents completed the process of selecting Peck. . . . The search process is just being launched. The preliminary skirmishing on public access to its progress has already begun. . . . The credibility of the selection process will be determined in the formative stages. The easiest time to communicate is early on, when tempers are calm.

Editorial, Albuquerque Journal, Sept. 28, 1997 (emphasis added).

> It was clear, looking at the scene in Lexington yesterday, that the University of Kentucky remains stuck in the past. The UK board proved itself to be insular, political, dated. The selection process through which Charles Wethington became UK's new president was an old-fashioned exercise of raw power, having little to do with the larger purposes and values of modern public education. This means, most likely, that Kentucky still isn't ready for the academic big leagues. It means

> that Kentucky's kids will have to wait a while longer before they can stay at home, pay in-state tuition and enjoy the kind of education that other states - Indiana and North Carolina for example - manage to offer. It means the development of at least one really great public university for Kentucky youngsters will continue to take second place to manipulation and infighting. . . . A university dominated by a board that can airily dismiss the legitimate concerns of its faculty and students, on a matter of such importance as the selection of a new president, is in trouble. Such an institution is unlikely to develop the critical mass of outstanding scholarship, teaching and service that is necessary for greatness.

The Courier-Journal, Louisville, Kentucky, Sept. 20, 1990 (emphasis added).[4]

Conclusion

This Court has consistently held that the operation of a public school, school district, college, or university is a matter of public concern that affords First Amendment

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[4] This newspaper article was located using a simplistic search in the "Major Newspapers" database in www.lexis.com and the search terms "(search or select!) /s new president /s (university or college) /p critic!." A number of similar articles are included in the Petition for Rehearing *En Banc*. App. D at 29a -32a. Petitioner suggests that a more sophisticated search would disclose many more newspaper articles addressing the subject at issue in this petition.

matter of public concern that affords First Amendment protection to teachers who criticize aspects of that operation. The Court of Appeals has decreed in this case that the First Amendment does not apply to the selection of a university president, that such a decision is an "internal" matter only, and that it is not a matter of public concern. The decision of the Court of Appeals conflicts with the principles repeatedly stated by this Court and, if allowed to stand, would signify a major curtailment of First Amendment rights. The selection of a university president, and the process by which that selection is made, is the very foundation on which the operation of the university is predicated. An issue of greater public concern in the university context, a concern of faculty, students, and even the larger, taxpaying community, can hardly be imagined. The decision of the Court of Appeals should be reserved.

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed June 22, 2000]

No. 99-2017

CATHERINE CLINGER, *Plaintiff--Appellant*,	)
v.	)
NEW MEXICO HIGHLANDS UNIVERSITY, BOARD OF REGENTS; SELIMO RAEL; THOMAS KEESING; DAVID ARCHULETA, in their official and individual capacities, and LEROY SANCHEZ, *Defendants--Appellees*.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D. Ct. No. CIV-97-548-LH)

Before **TACHA, McWILLIAMS,** and **MAGILL,*** Circuit Judges.

OPINION

TACHA, Circuit Judge.

Plaintiff Catherine Clinger appeals the district court's grant of summary judgment. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I.

In 1992, the New Mexico Highlands University ("University") hired plaintiff to serve as an Assistant Professor of Art. As a contractual employee with probationary status, plaintiff was subject to the University's tenure policy. In October 1996, plaintiff applied for tenure and, on December 9, 1996, the Board of Regents denied her application.

In May 1997, plaintiff filed an amended complaint seeking damages and injunctive relief. She named as defendants the Board of Regents; Selimo Rael, the University's president; and Thomas Keesing, David Archuleta and Leroy Sanchez, all present or former members of the Board of Regents. Pursuant to 42 U.S.C. § 1983, plaintiff alleged that defendants, in denying her tenure, retaliated

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* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

against her for exercising her First Amendment right to free speech and violated her substantive due process guarantees. Plaintiff also claimed that defendants discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e- 2(a)(1), and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). Plaintiff further alleged that defendants breached her employment contract in violation of New Mexico common law.

In a bench ruling, the district court granted defendants' motion for summary judgment on the First Amendment, substantive due process and sex discrimination claims. The court dismissed without prejudice the state claim of contract breach.[1] Plaintiff filed a timely appeal.

II.

We review the district court's grant of summary judgment de novo, applying the same legal standard as the court below. Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313 (10th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we examine the factual record and draw reasonable inferences therefrom in the light most

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[1] Plaintiff has abandoned her state claim on this appeal.

favorable to the nonmoving party. Bullington, 186 F.3d at 1313.

As the moving parties, defendants shoulder the "initial burden to show that there is an absence of evidence to support the nonmoving party's case." Thomas v. IBM, 48 F.3d 478, 484 (10th Cir.1995) (internal quotation marks and citation omitted). If defendants meet this burden, it falls to plaintiff to "identify specific facts that show the existence of a genuine issue of material fact." Id. "The party opposing the motion must present sufficient evidence in specific, factual form for a jury to return a verdict in that party's favor." Id. (internal quotation marks and citation omitted).

A.

"It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin v. McPherson, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987). Thus, even as a probationary employee, plaintiff "may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression." Id. at 383-84, 107 S.Ct. 2891.

We review plaintiff's First Amendment retaliation claim under the four-step test derived from Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir.1998). First, we "must determine whether the employee's speech can be 'fairly characterized as

characterized as constituting speech on a matter of public concern.'" Gardetto v. Mason, 100 F.3d 803, 811 (10th Cir.1996) (quoting Connick, 461 U.S. at 146, 103 S.Ct. 1684). If it can, we must then "balance the employee's interest, as a citizen, in commenting upon matters of public concern against 'the interest of the State, as an employer, in promoting the efficiency of the public service[s] it performs through its employees.'" Id. (quoting Pickering, 391 U.S. at 568, 88 S.Ct. 1731). These first two questions are legal in nature and must be resolved by the court. Id.

If the balance tips in favor of the employee, the employee next must "prove that the protected speech was a substantial factor or a motivating factor in the detrimental employment decision." Id. If the employee makes this showing, then the burden shifts to the employer to show that it would have made the same employment decision in the absence of the protected speech. Id. These final questions concern causation and are properly resolved by the factfinder. Id.

Plaintiff points to four instances of speech between 1994 and 1996 in support of her retaliation claim: (1) advocacy before the Faculty Senate of a "no confidence" vote with respect to four members of the Board of Regents in light of their purported failure to comply with an internal policy on the appointment of a new president, (2) comments before the Faculty Senate criticizing Regent Keesing in particular as untrustworthy based on the presidential appointment process, (3) criticism of Selimo Rael for accepting the position of University President, and (4) criticism of a proposed academic reorganization purportedly in conflict with the Faculty Handbook and the Board of Regents policy manual.

The district court found that plaintiff's speech did not touch on matters of sufficient public concern to merit constitutional protection. We agree. "Matters of public concern are those which can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" Id. at 812 (quoting Connick, 461 U.S. at 146, 103 S.Ct. 1684). "Speech concerning individual personnel disputes or internal policies will typically not involve public concern." Curtis v. Oklahoma City Pub. Schools Bd. of Educ., 147 F.3d 1200, 1212 (10th Cir.1998). "On the other hand, speech that seeks to expose improper operations of the government or questions the integrity of government officials clearly concerns vital public interests." Id. (internal quotation marks and citation omitted).

In the first three instances, plaintiff publicly criticized the University president and the Board of Trustees. In the fourth instance, she spoke out generally in opposition to a proposed academic reorganization. She claims that this conduct implicates the public interest under our holding in Gardetto v. Mason, 100 F.3d 803 (10th Cir.1996). In Gardetto, we held, inter alia, that the plaintiff's efforts to obtain a vote of "no confidence" against a college president and her public criticism of the president's reduction-in-force (RIF) plan involved matters of public concern. 100 F.3d at 813-14. In particular, we found that the plaintiff's call for the "no confidence" vote "implicated broader concerns about [the president's] possible misrepresentation of his educational status, his lack of integrity and leadership, and the corresponding decline in student enrollment" at the college. Id. at 813. We also concluded that the plaintiff's opposition to the RIF touched a matter of public concern because "[t]he speech of persons able to offer a well-informed perspective on

expenditures of public funds may be especially valuable to public debate on such subjects." Id. at 814.

We find the instant case distinguishable from Gardetto. The plaintiff in Gardetto publicly challenged the integrity, qualifications and alleged misrepresentations of a public official. In this case, plaintiff simply differed with the Board of Trustees on the internal process they followed in selecting a president and reorganizing the University. Unlike the plaintiff in Gardetto, plaintiff here did not challenge the actual credentials or qualifications of the president; she merely faulted him for taking part in an allegedly unsatisfactory process. While plaintiff publicly charged Regent Keesing as untrustworthy, she did so based on his participation in the same internal process. In essence, plaintiff has challenged the "internal structure and governance" of the University, and matters of this nature "rarely transcend the internal workings of the university to affect the political or social life of the community." Bunger v. University of Okla. Bd. of Regents, 95 F.3d 987, 992 (10th Cir.1996). "The First Amendment does not require public universities to subject internal structural arrangements and administrative procedures to public scrutiny and debate." Id.

Furthermore, in Gardetto, we stressed that criticism of a proposed RIF implicated the public interest because "speech about the use of public funds touches upon a matter of public concern." 100 F.3d at 813 (internal quotation marks and citation omitted). Reviewing the record before the district court, we find that plaintiff here has not made a credible showing that she spoke out in the interest of conserving the

public fisc or on any other matter that transcended the internal policies of the university.

Having concluded that none of the proffered speech involves matters of public concern, we need not, at this stage, evaluate plaintiff's extended arguments concerning her qualifications for tenure. "[W]here an employee's speech cannot be characterized as speech on a matter of public concern, it is unnecessary for the court to examine the reasons for her discharge, demotion, or suspension." Id. at 812.

B.

Plaintiff next contends that defendants violated her substantive due process rights when they denied her tenure. "In order to present a claim of denial of substantive due process by a discharge for arbitrary or capricious reasons, a liberty or property interest must be present to which the protection of due process can attach." Curtis, 147 F.3d at 1215 (internal quotation marks and citation omitted). Plaintiff contends that she had an implied contract with the University that created a property interest entitling her to tenure. She claims that the denial of tenure was arbitrary and capricious and thus violated her substantive Fourteenth Amendment rights in that property.

As we recently noted, "our circuit precedent does not clearly delineate what specific property interests in employment are fundamental, and thus protected by the doctrine of substantive due process." Hennigh v. City of Shawnee, 155 F.3d 1249, 1257 (10th Cir.1998). In general, we look to state law to determine whether a property interest in employment exists. Lighton v. University of Utah, 209

F.3d 1213, 1221 (10th Cir.2000). Plaintiff's asserted property interest as a non-tenured professor is dubious under New Mexico law. Cf. Jacobs v. Meister, 108 N.M. 488, 775 P.2d 254, 259-261 (N.M.App.1989) (questioning whether a nontenured university professor is entitled to procedural due process protections). See also Bunger, 95 F.3d at 990 ("Tenured professors in Oklahoma possess a property interest in their continued employment that is protected by the Due Process Clause. However, untenured professors in Oklahoma do not possess this legitimate claim of entitlement to their reappointment absent a specific contractual guarantee to that effect.") (internal quotation marks and citations omitted).

However, even assuming plaintiff had a property interest in continued employment with the University, there is no evidence in the record that the deprivation of that interest was either arbitrary or capricious. In her position as an assistant professor of art, plaintiff was required to obtain a Master of Fine Arts (M.F.A.) or demonstrate equivalent experience and a professional record in printmaking. The evidence in the record indicates that she was aware of this degree requirement and that she was expected to complete her M.F.A. before promotion or award of tenure. At the time of the tenure decision, plaintiff had not obtained her M.F.A., and defendants expressly based the denial of tenure on her failure to earn the required degree. While plaintiff contends that she had demonstrated the requisite equivalent experience and was thus not required to obtain her terminal degree, the Regents obviously disagreed. We therefore find the Regents' tenure decision concerning plaintiff neither arbitrary nor capricious. "The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised

personnel decisions." Curtis, 147 F.3d at 1215 (internal quotation marks and citation omitted).

C.

Finally, plaintiff claims that defendants discriminated against her on the basis of gender, in violation of both Title VII and Title IX. The district court found that plaintiff failed to produce any direct or circumstantial evidence that defendants acted with a discriminatory motive. We agree. Even assuming plaintiff satisfied her Title VII prima facie case, defendants have come forward with a legitimate, nondiscriminatory reason for their tenure decision, namely, her failure to obtain an M.F.A. or demonstrate equivalent experience. Plaintiff has not presented sufficient evidence to create a genuine dispute of material fact as to whether the defendants' proffered reason is pretext for sexual discrimination. See Bullington, 186 F.3d at 1316.

Because the district court correctly dismissed plaintiff's Title VII claim, we need not independently consider her Title IX claim. See Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 (10th Cir.1987) ("Both Title VII and Title IX prohibit discrimination on the basis of sex. . . . We find no persuasive reason not to apply Title VII's substantive standards regarding sex discrimination to Title IX suits.").

For the foregoing reasons, we **AFFIRM**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[Filed December 18, 1998]

No. CIV 97-0548 LH/DJS

CATHERINE CLINGER,
Plaintiff,

v.

THE BOARD OF REGENTS OF NEW MEXICO HIGHLANDS UNIVERSITY, and SELIMO RAEL, THOMAS KEESING, DAVID ARCHULETA, and LEROY SANCHEZ, in their official and individual capacities,
Defendants.

ORDER OF SUMMARY JUDGMENT AND DISMISSAL

On the date below, the Court considered Defendants' Motion for Summary judgment as to each of Plaintiffs asserted theories of recovery. Defendants' Motion for Summary Judgment is well-taken and is hereby GRANTED as to Plaintiff's claims of gender discrimination pursuant to

either Title VII or Title IX, and Plaintiff's claims of First Amendment and Due Process violations pursued under 42 U.S.C. § 1983. Defendants' Motion is denied as to Plaintiff's state law breach of contract claim, plaintiff's state law breach of contract claim is dismissed without prejudice pursuant to Defendants' immunity under the Eleventh Amendment to the United States Constitution.

/s/_____
THE HONORABLE LEROY HANSEN
UNITED STATES DISTRICT COURT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed August 28, 2000]

No. 99-2017

CATHERINE CLINGER,
Plaintiff--Appellant,

v.

NEW MEXICO HIGHLANDS UNIVERSITY, BOARD OF REGENTS; SELIMO RAEL; THOMAS KEESING; DAVID ARCHULETA, in their official and individual capacities, and LEROY SANCHEZ,
Defendants--Appellees.

ORDER

Before **TACHA, MCWILLIAMS, and MAGILL***, Circuit Judges.

Appellees' motion for extension of time to file a response to appellant's petition for rehearing is granted.

Appellant Catherine Clinger's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

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* The Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed July 5, 2000]

No. 99-2017

CATHERINE CLINGER, *Plaintiff--Appellant*,	)
v.	)
NEW MEXICO HIGHLANDS UNIVERSITY, BOARD OF REGENTS; SELIMO RAEL; THOMAS KEESING; DAVID ARCHULETA, in their official and individual capacities, and LEROY SANCHEZ, *Defendants--Appellees*.	)

Appeal from U. S. District Court
for the District of New Mexico
The Honorable C. LeRoy Hansen, U. S. District Judge

APPELLANT'S PETITION FOR REHEARING EN BANC

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Southside Pub. Schs. v. Hill,
827 F.2d 270 (8th Cir. 1987) . . . . . .

Trotman v. Board of Trustees of Lincoln Univ.
635 F.2d 216 (3d Cir. 1980) . . . . . .

RULE 35(B)(1) STATEMENT

1. This case involves a question of exceptional importance, namely, the parameters for determining what constitutes "speech on a matter of public concern" that is entitled to protection under the First Amendment.

2. The Panel decision conflicts with this Court's decision in *Gardetto v. Mason,* 100 F.3d 803 (10th Cir. 1996); with the principles set out by the United States Supreme Court on this issue in *Pickering v. Board of Edu. of Township High Sch.,* 391 U.S. 563 (1968); *Perry v. Sindermann,* 408 U.S. 593 (1972); *Mount Healthy City Sch. Dist. Board of Edu. v. Doyle,* 429 U.S. 274 (1977); and *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410 (1979); and with the decisions in several other circuits; and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

ARGUMENT

I. Professor Clinger's Speech Involved A Matter of Public Concern.

Professor Clinger publicly criticized the Highlands Board of Regents for selecting the new president of the University without engaging in the nationwide search promised by the Regents. That criticism included proposing to the Faculty Senate a "no confidence" vote as to four of the Regents, asserting in the Faculty Senate that one of the Regents was "untrustworthy," and criticism of the person selected as president for accepting the position. Panel Opinion at 5. The Panel concluded that Professor Clinger's

speech "did not touch on matters of sufficient public concern to merit constitutional protection," implicitly finding that the process for selecting a president of a public university is not a "matter of political, social, or other concern to the community." Panel Opinion at 6. Instead, according to the Panel, Professor Clinger "simply differed with the Board of Trustees on the internal process they followed in selecting the president and reorganizing the university. . . . In essence, plaintiff has challenged the 'internal structure and governance of the University. . . ." Panel Opinion at 7. The Panel's conclusion that the process for selection of the president of a public university is not a matter of "public concern" is, however, contrary to common sense, the reality of the frequent public debates on that very subject, and the precedents established by this Court, other circuit courts, and the United States Supreme Court.

First, the issue of the "process" for selecting a new president of Highlands University was in fact an issue of great concern to Professor Clinger and the Highlands faculty. As Regent Keesing, one of the named defendants and appellees, stated:

> We had pretty much a war going on over the presidency, whether to keep a president or search for a new president, and the faculty was on one side and the Regents were on the other, so Catherine [Professor Clinger] was real involved in that issue.

Aplt. App. at 197.

> Yeah, Professor Clinger was well thought of at that campus and an excellent professor . . . [W]e had a disagreement over the president of the university, but - that was a disagreement with most of the faculty, a lot of people.

Aplt. App. at 198.

Professor Clinger eloquently stated the basis for that concern in explaining why she sponsored a "no confidence" resolution with respect to the Regents who reneged on their commitment to conduct a national search for the new president.

> Q: Paragraph 17 of your amended complaint, . . . talks about a referendum or, rather, a resolution calling for a referendum of the faculty and your advocacy of a no confidence vote. That would be in the board of regents; correct?
>
> A: Yes.
>
> Q: And what was the basis of the no confidence vote at that time?
>
> A: The regents were not following a process for the selection of a president of the university that they had previously advocated in print, and which would have a detrimental effect on the greater university community.

Q: The process that they weren't following, are you referring to the same thing we've discussed already, the failure to go to a national search?

A: Yes, and appointment of a selection committee, et cetera.

Q. How is it that you believe that the university is harmed by that in terms of President Rael actually obtaining that position?

A: I believe that it would have an adverse effect on accreditation proceedings, that it would have a negative effect on grants received by the university, that it would have negative impact on the confidence of the community in the university, which is an integral part of Las Vegas and San Miguel and Mora County.

Q: And that's because you think President Rael is a bad president or, just, the process was not followed?

A: I believe that the process wasn't followed, and it set a very poor example for our students and for the faculty and other concerns, other people.

Aplt. App. at 212 (emphasis added).

Professor Clinger's concern about the impact of the presidential selection process on accreditation of the university, grants sought by the university, and the confidence of the community in the university can hardly be considered an "individual personnel dispute" or merely part of "the internal workings of the university," as found by the Panel. Panel Opinion at 6, 7, quoting from *Curtis v. Oklahoma City Pub. Sch. Bd. of Edu.*, 147 F.3d 1200, 1212 (10th Cir. 1998); and *Bunger v. Univ. of Okla. Bd. of Regents*, 95 F.3d 987,992 (10th Cir. 1996). It made no difference to Professor Clinger personally how the next president was chosen. Her concern was about the impact on the University itself and the community in which it was located.

Second, that the concerns of Professor Clinger and the Highlands faculty were also a matter of "public concern" is confirmed by the publicity that accompanied the issue.*

> Students at New Mexico Highlands University raised more questions over a recent decision by the university's board of regents to extend the contract of President Selimo Rael. Steven Martinez, a graduate in Southwest Studies, and a member of the student senate, said Tuesday he and other students solicited 400 signatures on a petition in support of a nationwide search for a university president - a search eschewed

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* These articles were located by reviewing the "archives" at www.abqjournal.com and utilizing the terms "presidential search" and "Clinger." Due to page limitations, appellant has included only a few of the many articles dealing with those topics.

> by regents at their Nov. 4 meeting. . . . Martinez said he and other students, faculty and residents of Highlands' hometown, Las Vegas, NM, are concerned that the lack of a nationwide search for president is filtering down to the next level of administrative positions. Those serving in interim vice presidential positions will be hired without looking elsewhere, Martinez said.

Albuquerque Journal, November 29, 1995.

> Conflict continued to brew this week in Las Vegas, NM, over the New Mexico Highlands University board of regents decision to extend the university president's contract. Several students and faculty members drew up a "position paper" outlining their protests of the regents' decision in November to extend the contract of President Selimo C. Rael until mid-1998. Rael, who was the university's vice president of finance, was tapped as interim president in March. Some NMHU students and faculty wanted a national search to generate a pool of applicants before a permanent placement was found for Gilbert Sanchez, who was ousted by the majority of the regents earlier this year. . . . The position paper calls for the regents to rescind Rael's contract and begin a national presidential search. It also asked that the regents appoint an interim president from outside the administration.

Albuquerque Journal, December 2, 1995.

> Highlands University faculty and student protesters united Wednesday to demand the immediate dismissal of university president Selimo Rael. They said they want Rael out because the board of regents hired him in 1995 without a national search. . . . About 30 well-behaved students and several faculty members picketed in front of the administration building. They carried signs painted with anti-Rael slogans and spoke together about the selection process that allowed Rael to become president. "I will consider going to UNM because prospective employers might say to me, 'Oh, you graduated from Highlands. That's the school with all the problems,'" said Rosa Pena, a first year student. While the students picketed, about 70 faculty members, a quorum of the university's full-time teaching staff, voted unanimously for Rael's dismissal during a general faculty meeting. . . . Faculty Senate President Catherine Clinger said Highlands is a member of the American Association of Governing Boards of Universities and Colleges, which encourages members to conduct national searches for top administrative personnel. Most colleges conduct national searches for presidents, said Clinger, an art and art history teacher at Highlands for more than five years and one of the four denied tenure. Nancy Bennett, spokeswoman for Santa Fe Community

> College, which will hire a new president soon to replace outgoing president Dr. Leonardo de la Garza said SFCC had a national search before it hired de la Garza and will conduct a similar search for a new president.

Albuquerque Journal, March 27, 1997 (emphasis added).**

Third, evidence that the process for selecting a university president is a matter of "public concern" is not limited to the events that actually transpired at Highlands and gave rise to this lawsuit. A mere sampling of the newspaper articles devoted to the process for selecting a new president at the University of New Mexico is set forth below.

> The University of New Mexico Board of Regents is tooling up to select a new president for the institution, the second such search in this decade. It will hear from its local constituencies again - and, if it is prudent, it will pull them into the process. It's characteristic of tasks with as many constituencies as the naming of a university president that the manner in which they are done becomes as important as the quality of the result. A flawed process can never produce a consensus selection. In late 1989

** The evidence is undisputed that Professor Clinger advocated a national search for a new president and criticized the Regents' interim hiring of President Rael prior to her denial of tenure in December 1996.

> and early 1990, the search and selection procedure that resulted in the naming of President Richard Peck ended in an eruption of bad feeling and litigation. . . . The Hispanic coalition in 1990 expressed its opposition to: "any process that selects candidates in a secret cabal; any process that does not surface any New Mexican candidate; any process that does not include community and taxpayer input; any process that after months of secrecy now is determined to reach a rapid decision and force a candidate on New Mexico; any process that in secrecy can discriminate against Hispanics and minorities in impunity." Clearly, tempers were high as the UNM Regents completed the process of selecting Peck. . . . The search process is just being launched. The preliminary skirmishing on public access to its progress has already begun. . . . The credibility of the selection process will be determined in the formative stages. The easiest time to communicate is early on, when tempers are calm.

Editorial, Albuquerque Journal, Sept. 28, 1997 (emphasis added). As events transpired, the UNM Regents did not heed the opinion of the editorialist quoted above.

> Finding just the right sort of person to head a keystone institution like the University of New Mexico is an important task - too important to involve riffraff like the UNM faculty, staff, students or the public. The Board of Regents

> was fairly successful in avoiding such distractions in the last secretive presidential search, but the University was dragged into court after the fact. There, in front of a judge, UNM officials were suitably contrite and signed a consent decree in 1991, the purpose of which was to assure a more open process in an important appointment to public office. Another intent of the decree was to assure a meaningful role for faculty, student and staff members of future search committees, according to Bob Johnson, executive director of the Foundation for Open Government, a party to the suit. The decree appears to be about as effective as the 1991 agreement between the United Nations and Iraq. Saddam Hussein plays hide and seek with weapons while UNM plays legalistic cat-and-mouse in the current search process.

Editorial, Albuquerque Journal, March 1, 1998 (emphasis added).

> The University of New Mexico Board of Regents is scheduled to name the final eight members of an eleven-person presidential search committee during its meeting on Tuesday. The Regents are looking for a successor for Richard Peck, who stepped down in August. They started a search late last year but scrapped it in April amid allegations by open-government activists that they hadn't

> followed proper procedures. They decided to start the search again this fall.

Albuquerque Journal, Oct. 10, 1998 (emphasis added).

It is not only the State of New Mexico in which the selection of a president to head a public university is a matter of "public concern."***

> It was clear, looking at the scene in Lexington yesterday, that the University of Kentucky remains stuck in the past. The UK board proved itself to be insular, political, dated. The selection process through which Charles Wethington became UK's new president was an old-fashioned exercise of raw power, having little to do with the larger purposes and values of modern public education. This means, most likely, that Kentucky still isn't ready for the academic big leagues. It means that Kentucky's kids will have to wait a while longer before they can stay at home, pay instate tuition and enjoy the kind of education that other states - Indiana and North Carolina for example - manage to offer. It means the development of at least one really great public

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*** The following newspaper articles were located using a simplistic search in the "Major Newspapers" database in www.lexis.com and the search terms "(search or select!)/s new president /s (university or college) /p critic!." Appellant suggests that a more sophisticated search would disclose many more newspaper articles addressing the subject at issue in this petition.

> university for Kentucky youngsters will continue to take second place to manipulation and infighting. . . . A university dominated by a board that can airily dismiss the legitimate concerns of its faculty and students, on a matter of such importance as the selection of a new president, is in trouble. Such an institution is unlikely to develop the critical mass of outstanding scholarship, teaching and service that is necessary for greatness.

The Courier-Journal; Louisville, Kentucky, Sept. 20, 1990 (emphasis added).

> University system Chancellor Adam Herbert hates the state law that requires searches for new university presidents to be conducted in the open. He and other critics of the law say it discourages many good candidates from applying. . . . Funny, Herbert's predecessor, former Chancellor Charles Reed, never had such problems. Reed oversaw a lot of smooth and successful presidential searches carried out in the open - including the one that produced Herbert at UNF. . . . Maybe Herbert, Ross and other university system officials would attract a stronger and deeper pool of candidates for presidential openings if they spent less time badmouthing the process they are asking candidates to enter. And maybe Herbert should find a better excuse for the shortcomings of the presidential searches that have been conducted since he took charge.

Editorial, St. Petersburg Times, Oct. 26, 1999 (emphasis added).

> Las Vegas - the search for a new president for Community College of Southern Nevada will proceed despite legal questions about its process.

USA Today, April 4, 1994 (emphasis added).

> When San Jose University was looking for a new president, a nine-month search led to a final, "affirmative action" slate of six contenders including one white male and the rest, women and minorities. The final selection of Ruth Leventhal, dean of Penn State's Harrisburg campus still didn't quiet criticism that the process wasn't "representative" enough of various "communities". . . .

Editorial, The Orange County Register, Oct. 15, 1992 (emphasis added).

> The Top 10 Midlands stories were compiled from a list of major Nebraska, Iowa, and Omaha-Council Bluffs metropolitan area stories: . . .
>
> 9. Massengale at Helm. A search for a new president for the University of Nebraska system winds up with the selection of the insider, Martin

> Massengale, and a number of critics of the process.

Omaha World Herald, Dec. 31, 1990 (emphasis added).

While all of these newspaper articles addressing the importance of the process for selection of a public university president demonstrate conclusively that the issue is a "matter of public concern," perhaps the article by The Courier-Journal in Louisville, Kentucky, stated it best:

> A university dominated by a board that can airily dismiss the legitimate concerns of its faculty and students, on a matter of such importance as the selection of a new president, is in trouble. Such an institution is unlikely to develop the critical mass of outstanding scholarship, teaching and service that is necessary for greatness.

Professor Clinger certainly understood and attempted to articulate the importance of this issue. That the Panel summarily rejected the importance of Professor Clinger's complaint, let alone that it deemed her complaint to relate only to a matter of "internal structure and governance," is simply incomprehensible.

Fourth, the Panel's conclusion is inconsistent with the principles underlying the decisions of the United States Supreme Court. For example, in *Picketing v. Board of Edu. of Township High Sch.*, 391 U.S. 563 (1968), what might be considered the "original" case in this area, the Court stated clearly that

> a difference of opinion between Pickering [a teacher] and the Board as to the preferable manner of operating the school system [is] a difference of opinion that clearly concerns an issue of general public interest.

391 U.S. at 571. Similarly, Professor Clinger, in criticizing the Regents for refusing to conduct a national search for president, had and expressed a difference of opinion as to "the preferable manner of operating" the University.[****]

Next, in *Perry v. Sindermann,* 408 U.S. 593 (1972), the Court dealt with a situation where a teacher at a public junior college "became involved in public disagreements with the policies of the college's Board of Regents." 408 U.S. at 594 (emphasis added).

[****] *Pickering* specifically criticized the school board's handling of a bond issue proposal and its subsequent allocation of the financial resources generated by the bonds. 391 U.S. at 567, 569. The Court in no way suggested, however, that identifying matters of public concern is dependent on the presence of a "financial issue." Thus, the Court squarely rejected the broader premise that "teachers . . . relinquish the First Amendment rights . . . to comment on matters of public interest in connection with the operation of the public schools in which they work. . . ." 391 U.S. at 568 (emphasis added). *See also, Southside Pub. Schs. v. Hill,* 827 F.2d 270, 274 (8th Cir. 1987), recognizing *Pickering* as holding that "educational impact" is a matter of public concern but also noting that "lack of financial support because of diversion of funds is not the only way to impair an educational program."

> The respondent has alleged that his non-retention was based on his testimony before legislative committees and his other public statements critical of the Regents' policies. . . . Plainly, these allegations present a bona fide constitutional claim.

408 U.S. at 598 (emphasis added). Likewise, Professor Clinger spoke out against "the Regents policies" in this case.*****

Then, in *Mount Healthy City Sch. Dist. Board of Edu. v. Doyle,* 429 U.S. 274, 282 (1977), the Court accepted the lower court's conclusion that a teacher's public expression of disagreement with a school principal's proposed dress code for faculty involved a matter of public concern. Surely the process for selecting the president of a public university is more obviously a "matter of public concern" than is the faculty dress code at a public high school.

Finally, in *Givhan v. Western Line Consol. Sch. Dist.,* 439 U.S. 410, 411 (1979), a unanimous Court found that a first amendment violation could occur when "the primary reason for the school district's failure to renew petitioner's

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***** In passing the Court noted that *Sindermann* and the Regents differed on whether the college should be elevated to four-year status. 408 U.S. at 594. There is no indication in the opinion, however, that the nature of the "policy" disagreement was important in the Court's conclusion that the speech involved a matter of public concern.

contract was her criticism of the policies and practices of the school district. . . .[******] (Emphasis added.)

In summary, the Supreme Court cases dealing with this issue in the context of public schools uniformly stand for the proposition that teacher criticism of school "policy" is a matter of public concern entitled to First Amendment protection. While *Connick v. Myers,* 461 U.S. 138 (1983), may have eliminated or at least restricted such protection for disputes about purely "internal" policies, it should be clear that the selection of a president to run a public university is not simply a matter of "internal" policy or process, despite the Panel's stated conclusion. A policy or process that is perceived to have a potential impact on university accreditation, outside grants, and community confidence is a matter of "public" concern.

Applying the principles set out in these and other Supreme Court cases, numerous courts of appeals in other circuits have broadly applied the protections of the First Amendment in the academic environment. As stated by the court in *Piver v. Pender Cry. Bd. of Edu.,* 835 F.2d 1076, 1079-80 (4th Cir. 1987) (emphasis in original),

> *Picketing,* its antecedents, and its progeny - particularly *Connick* - make it plain that the "public concern" or "community interest"

[******] The teacher in *Givhan* evidently considered her school's "policies and practices" to be racially discriminatory. Once again, however, the Supreme Court did not concern itself with the specifics of the policy that was the subject of the teacher's speech.

> inquiry is better designed - and more concerned - to identify a narrow spectrum of employee speech that is not entitled to even qualified protection than it is to set outer limits on all that is. The principle that emerges is that all public employee speech that by content is within the general protection of the First Amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee - most typically, a private personnel grievance. . . . The focus is therefore upon whether the "public" or "community" is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a "private" matter between employer and employee.

In that particular case, a high school teacher was terminated after speaking out in support of tenure for his principal. The Fourth Circuit concluded that "the speech concerned matters of central importance to the public." 835 F.2d at 1077.

Similarly, in *Trotman v. Board of Trustees of Lincoln Univ.*, 635 F.2d 216, 218 (3d Cir. 1980), the Court stated that

> [t]he academic process entails, at its core, open communication leading to reasoned decisions. Our society assumes, in almost all cases with good reason, that different views within the academic community will be tested in an

> atmosphere of free debate. It is the dialectic process which underlies learning and progress.

In that case the plaintiff was fired after criticizing the president of the university for his proposal to increase the student-faculty ratio. 635 F.2d at 220. The Court of Appeals characterized the case as "one in which plaintiffs seek judicial censure of a course of conduct which they consider as having violated their constitutional right to engage in spirited criticism of administrative policies with which they disagree." 635 F.2d at 225.

> That much of the activity engaged in by plaintiffs falls within the protection of the First Amendment seems too evident to require any discussion. . . . The activity involved was essentially criticism of Branson [the president] and his policies and methods, which is "core" speech squarely encompassed within the First Amendment.

*Id.******* (emphasis added).

In *Maples v. Martin,* 858 F.2d 1546 (11th Cir. 1988), the plaintiffs prepared and circulated a report critical of the

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******* Ironically, Lincoln University asserted, just as Highlands does in this case, that the "real" reason for the plaintiff's termination was the lack of a terminal degree. The plaintiff contended, as does Professor Clinger in this case, that he had the equivalent of the required degree and that the degree issue was a "sham." 635 F.2d at 220.

university's president and its Mechanical Engineering Department. Not only did the report address issues "that could influence the public's perception of the quality of education provided by the Department," but it also emphasized "concern that the Department's accreditation is in jeopardy because of these problems." 858 F.2d at 1553. The court held that the plaintiffs' speech involved a matter of public concern, noting that "the status of a department's accreditation is the type of subject usually held to be of interest to the general public." *Id.* In the case at bar, in which one of Professor Clinger's concerns was the effect of the presidential selection process on accreditation for the entire university, the level of public concern would necessarily be even greater.

In *Honore v. Douglas,* 833 F.2d 565,567 (5th Cir. 1987), the plaintiff criticized the dean of the law school regarding admissions policy, size of the student population, the school budget, and untimely certification of graduates. The Court of Appeals agreed with the district court that these were matters of public concern. 833 F.2d at 569.********

Finally, in *Southside Pub. Schs.*, the plaintiff complained about deficiencies in implementing programs for handicapped students. The court found "dramatic confirmation" of its conclusion that such complaints involved a matter of public concern in the Supreme Court's then-most recent decision on the subject, *Rankin v. McPherson,* 483 U.S. 378 (1987). In *Rankin* the Court held that a public

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******** The Court erroneously referred to the public concern issue as an issue of fact instead of law.

employee could not be fired for commenting, "if they go for him again, I hope they get him," in reference to the assassination attempt on President Reagan.

> That the case at bar is a much clearer case of public concern than McPherson is shown by the fact that, as pointed out by Justice Scalia's dissent, McPherson's statement was only "one step removed from statements that we have previously held entitled to no First Amendment protection": assassination threats against the President and "fighting words." . . . Nevertheless, the majority of the Court applied the *Pickering - Connick - Mt. Healthy* criteria in favor of protecting the employee's speech. Surely, *a fortiori,* the same result must be reached by us in the case at bar.

827 F.2d at 275-76. Likewise here, Professor Clinger's criticism of the Regents in connection with the selection of a new president for Highlands University is a "much clearer case of public concern than *McPherson."*

This Court has previously followed the principles set forth in the above Supreme Court cases and applied in the above cases from other circuits. In *Gardetto* the Court strongly implied that any Speech critical of a university board of regents or board of trustees is speech on a matter of public concern.

> The speech incident that most obviously involves a matter of public concern is Gardetto's public support of the three non-

> incumbent candidates for positions on EWC's board of trustees. One of the primary functions of a college's board of trustees is to determine the extent and type of educational services available to the public; the board is not a committee charged merely with the administration of internal affairs.

100 F.3d at 812. Significantly, the opinion in *Gardetto* nowhere explains why the plaintiff supported the non-incumbent candidates over the incumbents, and the reasons for Gardetto's opposition to the incumbent trustees was, therefore, apparently unimportant to the Court. Of real importance, however, was the function of the board of trustees, that is, "to determine the extent and type of educational services available to the public." Due to the important public function of the trustees, any speech regarding them would be deemed speech on a matter of public concern. Based on *Gardetto* (as well as the other cases described above), it is sufficient that Professor Clinger's criticism of the Highlands Board of Regents was based on anything other than a personal dispute between her and the Regents.

The support that *Gardetro* provides for Professor Clinger's position is enhanced by the fact that her criticism of the Regents took the form of a proposal for a "no confidence" vote in the Faculty Senate. Similarly, in *Gardetto,* the plaintiff had proposed that a professional association render an advisory vote of "no confidence" in the president of the university. Unfortunately, in its Opinion in this case the Panel mistakenly confused two of the instances of the plaintiff's speech in *Gardetto* and further confused the

plaintiff's criticism of the president in that case. with Professor Clinger's criticism of the Regents in this case. Thus, the Panel appeared to base its decision, at least in part, on the fact that "unlike the plaintiff in *Gardetto,* plaintiff here did not challenge the actual credentials or qualifications of the president. . . ." Panel Opinion at 7.

In fact, however, the plaintiff's advocacy of a "no confidence" vote in the president in *Gardetto* was not premised on the president's "actual credentials or qualifications." That issue, relating to the president's use of the term "Doctor" when he did not actually possess a doctoral degree, was the "fourth event" deemed relevant to Gardetto's free speech claim. 100 F.3d at 809. It was the separate and independent "third incident," however, that involved the "no confidence" vote.

> The third incident that forms the basis of Gardetto's First Amendment claim occurred around the same time as the McBroom debate. Gardetto had become concerned with Mason's ability to administer the college. Accordingly, she proposed that the Eastern Wyoming Higher Educational Professional Association render an advisory vote of "no confidence" in Mason.

Id. (emphasis added).

It is true that this Court found Gardetto's criticism of the president for holding himself out as a doctor to constitute speech on a matter of public concern, because "the integrity, qualifications, and misrepresentations" of a highly visible

public official "obviously impact the social and political life of a community." 100 F.3d at 812. That was not the basis, however, for also finding that Gardetto's efforts to obtain a vote of "no confidence" in the president "also pertained to a matter of public concern." 100 F.3d at 813. Instead, this Court relied on *Connick* to distinguish speech regarding a public official's "job performance" and "lack of integrity and leadership" from speech of a more personal nature that does not seek "to inform the public that her superiors were not discharging their governmental responsibilities." In the case at bar, however, Professor Clinger was criticizing the Regents' "job performance" arid "lack of integrity and leadership" when she criticized their failure to conduct a national search for president, which they had previously promised to the University community. Furthermore, it is irrelevant whether Professor Clinger criticized the "actual credentials or qualifications of the president," because it is her criticism of the Board of Regents, and their "job performance" and "lack of integrity and leadership," that, at a minimum, renders her criticism speech on a matter of public concern. The credentials or qualifications of the president were irrelevant to Professor Clinger's criticism of the Regents.

In attempting to distinguish *Gardetto* from this case, the Panel compounded its error by likening this case to *Bunger*. That case involved, however, nothing more than a complaint by a few faculty members about a rule that restricted membership on "the Graduate Council" to tenured faculty. This Court held that such an issue "is a matter of internal structure and governance" and is not "an issue of social importance or heightened public interest." 95 F.3d at

992. Thus, the dispute was deemed "internal in scope and personal in nature." *Id.*

The case at bar simply cannot be reasonably construed to be "more like" *Bunger* than it is like *Gardetto*. This case involved Professor Clinger's participation in a "war" between the faculty and the Regents over the selection of a new president of the University. Unlike the Graduate Council in *Bunger*, the Board of Regents is not simply an "internal governing body," and the Regents' selection of a president to lead the entire University can hardly be deemed a "matter of internal structure and governance." Professor Clinger's stated concerns that a defective selection process would jeopardize university accreditation, grants, and the confidence of the wider community were both reasonable and practically the definition of "an issue of social importance or heightened public interest." The fact that extensive newspaper coverage over time proves many other instances of "public concern" about the process for selecting a university president merely serves to emphasize the point.

CONCLUSION

The decision of the Panel signifies a major retreat from the First Amendment protection previously recognized by this Court. That retreat is in conflict with the principles established by the United States Supreme Court and applied by numerous other circuits. The entire Court should grant the petition for rehearing, reverse the summary judgment granted by the trial court, and remand this case for trial.

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We hereby certify that a true
and correct copy of the fore-
going pleading was served via
First-Class mail to
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P. O. Box 20
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this 3rd day of June, 2000.

FOSTER JOHNSON McDONALD LUCERO KOINIS

By:/s/_____
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